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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 04 2007
SRC 06 001 51057

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

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Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner, an international provider of geological/engineering products and oilfield services, seeks to employ the beneficiary as a drilling applications engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In an introductory letter accompanying the initial filing, counsel described the beneficiary's work:

> [The beneficiary] is an expert in the field of drilling technologies. [The beneficiary] is responsible for evaluating difficult drilling situations and providing optimal solutions for same. He is currently working on a project that involves tapping into a large natural gas resource in northern Texas that is very difficult to reach. The solutions that he is providing for drilling in this area [are] enabling the company that is undertaking the drilling to increase productivity and lower its cost, as it can spend less time doing the actual drilling and more time actually producing the natural gas.

Counsel cited the national importance of petroleum and its related infrastructure, and the petitioner submitted background documents to that effect, but these are general concerns. Not everyone who works in a nationally important industry personally makes contributions of national scope. We must, therefore, consider the beneficiary's specific position and duties.

A *curriculum vitae* submitted with the initial filing details the beneficiary's work as an assistant rig superintendent/tool pusher/driller from 1986 to 1999, a drilling engineer from 1999 to 2000, a graduate research assistant from 2002 to 2004 and an engineering intern for part of 2003. The document also contains the following information about the beneficiary's current work for the petitioner:

> **Projects:**
> - Engineering Support at DEVON's office, Oklahoma City (Drilling Optimization Applications Engineering) for N. Texas and Oklahoma
> - Drilling Optimization project for PURE Resources, Midland (A Unocal Company) for wells in West Texas
> - Engineering support for VertiTrac (INTEQ) applications in Oklahoma
> - Bit selection, engineering support and drilling optimization for Hughes Christensen, Oklahoma
> - Impreg Bit Analysis for Hughes Christensen in Beckham County, OK
>
> **Responsibilities:** Offset well analysis, identify drillability issues, develop solutions, implement recommendations, bit selection, drilling optimization, BHA dynamics and vibration analysis, post well reporting and recycling knowledge

The duties described above appear to describe local, project-by-project work. Additional information is necessary for us to arrive at a finding that the beneficiary's work is national in scope.

Two affidavits accompanied the initial filing. The two affidavits appear to share common authorship, resulting in shared passages such as: "I am firmly of the opinion that his past achievements in this field have already yielded, and will continue to yield, tangible benefit to the United States. Specifically, the benefit [the beneficiary] adds is to a substantially greater degree than what a U.S. worker having the same minimum qualifications would add."

[redacted], Drilling Manager for Devon Energy's Central Division in Oklahoma City, stated:

> I have known [the beneficiary] since December 2004 in my professional capacity. I have worked closely with him and have knowledge of his work on numerous projects. [The beneficiary] has been instrumental in the analysis and design of assemblies and drill strings that have significantly improved Devon's drilling performance. This work has increased productivity and lowered drilling costs by reducing the number of days required to drill wells. This analysis has also been utilized and applied to other projects in the Texas Panhandle and Oklahoma.
>
> The US will directly benefit from [the beneficiary's] work because there is an extreme shortage of people with [the beneficiary's] expertise and training. . . . There is an inadequate supply of experienced engineers in the US to meet the demand.

The reference to a worker shortage is an argument for obtaining, rather than waiving, a labor certification. the job offer waiver based on national interest is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages. *Matter of New York State Dept. of Transportation* at 218.

Mr. [redacted] then narrowed the focus to the beneficiary's qualifications:

> [The beneficiary's] expertise allows more wells to be drilled per year with the currently available drilling rigs. [The beneficiary's] work also allows the drilling of more difficult to reach reserves by designing drilling assemblies and procedures that avoid buckling and failure. Prior to [the beneficiary's] design work, [redacted] experienced very slow and unpredictable performance especially with smaller diameter drill strings. His designs over came [*sic*] these problems and improved drilling rate of penetration by more than fifty percent. . . .
>
> His work has already made a very large contribution towards meeting the energy needs of the U.S. with domestic production. [redacted] will be significantly increasing the number of horizontal and direction well in the [redacted] and other unconventional projects in Oklahoma in 2006. Current plans are to drill approximately 290 of these wells in 2006 compared to 190 in 2005. [The beneficiary's] experience and performance will be vitally important to achieving this goal.

[redacted], Operations Manager for Crawley Petroleum Corporation, Oklahoma City, stated:

> I have known [the beneficiary] since approximately February of 2003 in my professional capacity. I have worked closely with him and have knowledge of his work on numerous projects. He has researched and prepared drilling programs and researched fracture stimulation. [The beneficiary] provides a valuable service to the domestic oil and gas industry due to his experience and education.
>
> The US will directly benefit from [the beneficiary's] work because he is a skilled and competent professional with a great deal of experience in the petroleum engineering field. Petroleum engineers with his experience level are in high demand.
>
> [The beneficiary] performed engineering level work at Crawley Petroleum while obtaining his Master's Degree in Petroleum Engineering from the University of Oklahoma. His work was thorough and exhaustive. The work that he performed was important to the efficient execution of drilling operations. . . .
>
> Petroleum engineer[s] with his level of experience and education are in short supply in the domestic oil and natural gas industry. He is capable and highly productive.

Both Mr. [redacted] and Mr. [redacted] worked closely with the beneficiary, and their knowledge of his work appears to derive largely from their collaboration with him on specific projects. The above affidavits establish that the beneficiary has performed valuable functions within specific projects, but they do not establish the extent to which the beneficiary has influenced the field as a whole (as opposed to the performance of one United States company seeking to outperform its United States rivals).

To demonstrate the effect of the beneficiary's work outside of his own projects, the petitioner submitted copies of a published article and two conference papers that the beneficiary co-authored. All of the articles discuss how new technology improved performance in developing "mature fields" in Oklahoma. As "evidence that others have cited [the beneficiary's] original contributions," the petitioner submitted another conference paper, which contains citations of the beneficiary's article and one of his conference papers. Among the authors of this paper is another of the petitioner's employees, and an employee of [redacted] a client of the petitioner for which the beneficiary had performed "[b]it selection, engineering support and drilling optimization." Like the beneficiary's own papers, this article essentially describes how technical innovations benefited a specific project. Unlike the beneficiary's own projects, this project took place in South America.

The citations in question follow this sentence in the paper: "To address the vertical hole section challenge, the operator elected to use a vertical drilling system (VDS) that has solved similar challenges in Argentina (et al)." The sentence cites *ten* articles and papers, numbered 2 through 11 in the paper's endnotes. The beneficiary's contributions, which appeared in 2004 and 2005, are numbered 10 and 11. The earliest paper in the joint citation appeared over a decade earlier, in 1993. The citations of the beneficiary's work, therefore, appear to be in reference to VDS technology in use at least as early as 1993.

The published and presented materials establish that the beneficiary's work can, at least in principle, influence engineers beyond the beneficiary's own work site. The materials, therefore, give the beneficiary's work national scope. They do not, however, demonstrate that the beneficiary has influenced his field to an extent that would justify the special benefit of a national interest waiver.

Counsel stated: "[t]he drilling technologies that [the beneficiary] develops helps to keep the United States on the track to continue to reduce its dependence on foreign energy sources. . . . [The beneficiary's] presence is critical in helping U.S. companies obtain more oil strategic reserves, which helps the United States economy." The petitioner's initial submission, however, did not demonstrate that the beneficiary is anything more than a successful petroleum engineer whose employers and clients have implemented his work.

On October 26, 2005, the director issued a request for evidence (RFE), stating, in part:

> The beneficiary just received his master's degree in Sept. 2004. How could he be more qualified than other very recent graduates in the field?
>
> . . . According to the information on the I-140 petition, the company has 26,900 employees. How would the loss of one employee cause the collapse of the company?

In response to the notice, counsel observed that the director did not actually request any specific evidence, instead asking a series of questions with little reference to the petitioner's initial evidentiary submissions. This criticism is not without merit, but the RFE, however flawed, clearly demonstrated that the petitioner's initial submission was insufficient to establish eligibility.

Counsel asserted:

> [T]he 3rd prong of the *NYSDOT* test seems to violate the Immigration and Nationality Act sections 203(b)(2)(A) and (B), which provide . . . that a job offer is not required for beneficiaries of National Interest Waivers. Since a job offer itself is not required, it is otherwise contradictory to require a petitioner to demonstrate that the national interest is served in not requiring a test of the labor market through the labor certification process.

Counsel's argument is not persuasive. *Matter of New York State Dept. of Transportation* does not require a job offer. Nevertheless, in many petitions involving waivers (including the present proceeding), there exists a specific job offer from a company to an alien worker. Once it is established that a job offer does, in fact, exist, it is reasonable to require the petitioner to establish why the usual procedures (including labor certification) ought to be waived. An employer's desire (however understandable) to expedite or simplify its permanent hiring of a given alien is not grounds for a waiver of the full job offer process that Congress saw fit to codify in the statute. *See Matter of New York State Dept. of Transportation* at 223. The statutory provisions establishing the national interest waiver do not require us to ignore the obvious existence of a job offer in this proceeding.

Counsel asserted that it is "illogical to require a test of a job market." Counsel does not identify any "test" apart from the labor certification process itself. *Matter of New York State Dept. of Transportation* does not require an employer to apply for a labor certification before seeking a waiver, and therefore no such "test" is "required." At the same time, *Matter of New York State Dept. of Transportation* does discourage attempts to rely on unproven claims or assumptions that could be proven or refuted by the labor certification process, such as the claim that "there is an extreme shortage of people with [the beneficiary's] expertise and training."

Counsel claimed that the beneficiary's "work has already significantly impacted his field of drilling engineering," and that "independent experts concur . . . and further establish his contributions to the field as a whole." One of the two "independent experts" two whom counsel referred is Professor [redacted] of the New Mexico Institute of Mining and Technology, who stated:

> My conclusion that [the beneficiary] is an engineer of exceptional value in the energy industry derives from my review of his employment achievements and an analysis of his educational background. During his career, [the beneficiary] has demonstrated achievements in a specialized and valuable area – improving drilling performance to maximize yield of petroleum resources. In this area, [the beneficiary] has demonstrated a notable ability to apply his technical and scientific knowledge to practical and business realities. . . .

> Few drilling engineers . . . possess [the beneficiary's] ability to evaluate, interpret and model improved drilling techniques in a way that is sensitive to the bottom line. . . .
>
> [The beneficiary's] work – to the extent that it increases our understanding of maximizing petroleum reserves – will ultimately represent a contribution to the US energy industry as a whole. . . .
>
> At [the University of Oklahoma, the beneficiary's] work focused on analyzing wells that, due to complicated geology, conventionally required a fracture simulation procedure in order to maximize drilling performance. [The beneficiary], in completing his thesis, was responsible for developing a methodology to predict production levels in this type of well without resorting to often expensive and complicated fracture simulations, an important insight that proved valuable in efficiently and inexpensively determining which wells had commercial potential. . . .
>
> By uniquely applying drilling technologies, [the beneficiary] has helped expand our utilization of energy reserves, and has made notable contributions to the field. Indeed, [the beneficiary's] list of technical achievements in the energy industry solidifies him as an outstanding drilling engineer in the field.

Prof. [redacted] of the University of Washington stated:

> I have reviewed various materials provided to me by representatives of [the beneficiary]. While I do not know [the beneficiary], it is clear to me that he is a petroleum drilling engineer whose immigration to the United States would be of great benefit to our country. In particular, [the beneficiary's] contributions to the energy industry stem from his expertise in drilling applications engineering. . . .
>
> Simply put, a petroleum company must have effective and efficient drilling in order to maximize the output of its reserves. [The beneficiary] provides such guidance by providing a wide range of sophisticated analytical techniques and technologies as discussed below. . . .
>
> [The beneficiary] has made important contributions to the energy industry. His qualifications include expertise in drilling applications and technologies, petroleum engineering and general drilling work-over to provide an in-depth understanding of the factors relevant to maximizing a reservoir's potential use and value. [The beneficiary's] experience and analytic skills have enabled him to advise major petroleum companies in the United states about the issues necessary to optimize the drilling of their reservoirs in order to make them more competitive and profitable.

Discussing specific periods of the beneficiary's career, Prof. [redacted] stated that these projects "imparted strong skills" and "a strong background in a broad variety of issues important to petroleum engineering." Simply being a skilled and well-trained petroleum engineer, however, is not a sufficient basis for granting the

waiver. The beneficiary seeks a waiver of requirements that typically apply to professionals in his field, and to qualify for that special benefit he must therefore stand out from others in that field.

Prof. [redacted] credited the beneficiary with "many . . . innovations," but he does not identify or describe them except to credit the beneficiary with "novel means of analysis that did not require fracture simulation," also mentioned by Prof. [redacted]. The record does not establish the extent, if any, to which other engineers have adopted this "novel means of analysis."

Prof. [redacted] praised the beneficiary's use of "cutting-edge and efficient drilling technologies," but there is no indication that the beneficiary is responsible for creating those technologies. The beneficiary's familiarity with new technology developed by others does not qualify him for the waiver. *See Matter of New York State Dept. of Transportation* at 221.

Prof. Bergantz listed projects in which the beneficiary increased the efficiency of drilling projects. It appears, from the record, that increasing efficiency is a relatively basic part of a petroleum drilling engineer's job. The burden is on the petitioner to show not only that the beneficiary does this job well, but also that the beneficiary's lasting national impact in this work has set him apart from other engineers who have worked on other projects.

The petitioner also submitted statements from faculty members who oversaw the beneficiary's training at the University of Oklahoma. Professor [redacted] stated that the beneficiary "developed the correlations that can be helpful to predict the productivity prior to fracture stimulation." Regarding the beneficiary's later work with the university's Drilling Consortium, Prof. [redacted] stated that the beneficiary's "contribution to the consortium was significant and well received by the industry. The research findings in the drilling area have resulted in lower drilling costs and more efficient drilling operations." Prof. [redacted] did not elaborate as to the nature of the "contribution" or "findings."

Professor [redacted] provided an affidavit that is similar in format to the affidavits submitted previously with the initial filing. Like those earlier affidavits, Prof. [redacted] affidavit contains the following passages:

> I have known [the beneficiary] since [*date*] in my professional capacity. I have worked closely with him and have knowledge of his work on numerous projects.
>
> * * *
>
> I am firmly of the opinion that his past achievements in this field have already yielded, and will continue to yield, tangible benefit to the United States. Specifically, the benefit [the beneficiary] adds is to a substantially greater degree than what a U.S. worker having the same minimum qualifications would add.
>
> * * *

> Based upon the foregoing, I am of the opinion that [the beneficiary's] experience and expertise in this field are to be considered in the national interest of the United States because of their present and future benefit to the oil and gas industries.

Leaving aside the above passages copied from earlier affidavits, and a discussion of Prof. [redacted] own credentials, what remains of the affidavit comprises eleven sentences, four of which relate to "a critical shortage of drilling engineers." The affidavit contains no substantive new information about the beneficiary.

The petitioner documented a second citation of the beneficiary's work, in a paper presented shortly before the petition's September 30, 2005 filing date. This citation does not appear to relate to technical application of methods developed by the beneficiary. Rather, the citation follows the general statement that "high levels of R&D spending" benefit producers because "[i]mproving product performance . . . creates value for the operator."

The director denied the petition on October 18, 2006, stating that counsel has focused on general issues rather than "the beneficiary, whose primary qualification seems to be that he has a Master's in petroleum engineering." The director also found that "[c]ounsel has misquoted [*Matter of New York State Dept. of Transportation*] with respect to labor certification." The director noted that "the beneficiary can easily remain legally employed [as a nonimmigrant] with the petitioner while the petitioner obtains a labor certification," and that the petitioner had presented no persuasive rationale for granting a waiver in this proceeding.

On appeal, the petitioner submits copies of several research papers co-authored by the beneficiary. Apart from a duplicate of a paper submitted previously, these papers were presented well after the petition's filing date and therefore cannot retroactively establish the beneficiary's eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

Counsel states that the beneficiary "has distinguish[ed] himself from the hypothetical minimally qualified U.S. worker both by presenting a record of past achievement that would reasonably lead to tangible benefits to the national interest as well as by demonstrating that he is playing a key or critical role in a project that will yield tangible benefits and is national in scope." The petitioner, however, has not persuasively distinguished the beneficiary from other qualified petroleum drilling applications engineers, or the beneficiary's projects from other projects. The minimal citation of the beneficiary's presented work does not have any demonstrated connection to the beneficiary's contributions as an engineer, and the independent recognition of his work amounts to statements from two individuals who appear to have been unaware of the beneficiary's work until the petitioner approached them to support the petition.

Counsel correctly states that the petitioner should not have to show that the company would "collapse" in the beneficiary's absence, and the director clearly erred by creating the impression that such evidence was required. Nevertheless, the petitioner has not shown that the beneficiary stands out among the company's thousands of employees. Without a doubt, the beneficiary has brought valuable expertise to drilling projects, but that is why drilling companies hire engineers. The petitioner has shown that the beneficiary fulfills a worthwhile function in an important industry, but this does not justify a waiver. Congress created no blanket waiver for petroleum

drilling applications engineers, and the petitioner has not persuasively demonstrated that this particular engineer should not be subject to the statutory requirements that normally apply to engineers in his field.

Counsel argues that, because the beneficiary is a member of the professions holding an advanced degree, the petitioner should not also have to establish that the beneficiary is an alien of exceptional ability. The director, however, imposed no such requirement. A *comparison* with aliens of exceptional ability necessarily arises from the statutory language at section 203(b)(2)(A) of the Act. Aliens of exceptional ability are presumed to "substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." Even so, such aliens are subject to the job offer/labor certification requirement. While the statute differentiates between aliens of exceptional ability and advanced-degree professionals, the statute does not state or imply that there exist two different national interest standards for those two classifications. In the absence of such a differentiation, we must assume a *single* national interest standard, equally applicable to *both* classifications. Substantial prospective benefit to the United States is, obviously, not sufficient to meet that standard, so every alien beneficiary must exceed a showing of substantial prospective benefit, whether that alien is an alien of exceptional ability or a member of the professions holding an advanced degree.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.